it unsound. The testator's intention, however, cannot extend beyond the first tenant in tail, for here the personalty and the realty must take different paths. On the tenant's death the one goes to his executor, the other to the next heir of the body.[10]

In order to prevent the separation where the tenant in tail dies during minority, a clause is often inserted suspending the vesting of the chattel title until such tenant becomes twenty-one. This provision is respected, and it does not of itself violate the rule against remoteness.[11] If the tenant has reached twenty-one, but predeceases the last life-tenant, the same undesired separation must occur. To prevent this the courts require a very clear expression of intention that the chattels are not to vest in a tenant in tail who has never had possession of the realty.[12] In a recent case the chattels were to be "used, held, and enjoyed" by the person for the time being entitled to the mansion house, and a tenant in tail under twenty-one was to have the "use and benefit" of them until the title vested on his majority. It was held not sufficiently clear that possession was meant to be a necessary incident to the vesting of title. *In re Lord Chesham's Trusts*, 25 T. L. R. 213 (Eng., Ch., Jan. 12, 1909). This seems rather severe, though in line with earlier decisions.[13]

COLLATERAL ATTACK UPON THE DECREE OF A PROBATE COURT. — The decree or judgment of a court can be collaterally attacked only when it has no jurisdiction over the proceedings involved;[1] otherwise the judgment or decree, however erroneous, is merely voidable by direct appeal.[2] Furthermore, this collateral attack on jurisdiction is allowable only when the record discloses the absence of jurisdiction:[3] if the record is silent as to the necessary facts, jurisdiction will be presumed as a matter of law;[4] and a statement of the facts in the record will be conclusive.[5]

By the prevailing opinion a probate court is one of general jurisdiction,[6] and, properly speaking, there are two facts necessary to give it jurisdiction: (1) the testator or intestate must be dead; (2) and the particular probate court in question must be the one entitled to adjudicate. (1) If we apply the general rule of collateral attack to the first of these facts, we may have

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10 See Scarsdale *v.* Curzon, *supra;* Williams, Executors, 10 ed., 549.

11 Christie *v.* Gosling, L. R. 1 H. L. 279; Martelli *v.* Holloway, L. R. 5 H. L. 532; Gray, Rule Perp., 2 ed., § 367, where the reason is given that the provision is applicable only to those who might otherwise have taken, viz., tenants in tail by purchase.

12 Potts *v.* Potts, 3 J. & L. 353, 369; *In re* Fothergill's Estate, *supra.*

13 Foley *v.* Burnell, 1 Bro. C. C. 274.

1 *In re* Sawyer, 124 U. S. 200; Wetmore *v.* Parker, 52 N. Y. 450.

2 White *v.* Crow, 110 U. S. 183; Comstock *v.* Crawford, 36 Wall. (U. S.) 396, 403.

3 Jester *v.* Spurgeon, 27 Mo. App. 477.

4 Huxley *v.* Harrold, 62 Mo. 516, 523.

5 Tucker, Treas. *v.* Sellers, 130 Ind. 514; Ward *v.* White, 66 Ill. App. 155.

6 The People *v.* Seelye, 146 Ill. 189, 222. Where a probate court is considered one of inferior jurisdiction, the only difference in the matter of collateral attack is, that no presumption as to jurisdiction will arise when the record is silent: the necessary facts must affirmatively appear, or the decree will be void. When, however, the record avers the necessary facts or discloses the want of them, the effect is the same as with regard to the decree of a court of general jurisdiction. The People *v.* Seelye, *supra.* See Carron *v.* Martin, 26 N. J. L. 594; Comstock *v.* Crawford, *supra.*

the extraordinary spectacle of a statement in a probate decree that X was deceased upheld against collateral attack in the face of clear proof to the contrary — in the face, even, of the personal appearance in court of X himself.[7] One court has, indeed, taken this stand.[8] But the law unquestionably is, that proof that the supposed decedent was alive at the time of probate makes the probate decree absolutely void upon collateral attack, regardless of the state of the record.[9] This is best regarded, it is submitted, as a departure from the technical rule of jurisdictional facts, taken to prevent gross and absurd injustice. It has, furthermore, been rested upon the ground that to vest title to a living person's property in an administrator is to deprive that person of his property without due process of law;[10] but the English law reaches the same result, though the constitutional argument has no application.[11] (2) Whether the particular probate court has jurisdiction by reason of the residence of the deceased within its territory, is a jurisdictional fact of less weight than the fact of death. It has, however, been attempted to make the two of equal consequence by reasoning that if the testator did not die a resident within the territory of the court, then legally he was not dead so far as that court was concerned.[12] On the other hand it has been claimed that locality is not a jurisdictional fact at all, because locality of the court concerns only jurisdiction over the particular *case*, and does not destroy the court's jurisdiction over the *subject matter* of that class of cases, which is the determining factor.[13] But neither of these views has prevailed, and the general rule applies: only when the deceased's non-residence in the county appears upon the record can the probate decree be collaterally attacked as void.[14] Nor can the lack of assets within the county be a ground for collateral attack in the absence of its disclosure on the record;[15] and, despite decisions to the contrary,[16] the rule should be the same where the deceased at the time of his death neither resided nor left assets within the state — there is no sufficient basis for distinguishing this from a grant of probate by the wrong county of the state of the deceased.[17]

A recent dissenting opinion attempts to enlarge the class of probate jurisdictional facts to include the appointment as administrator of a person "legally competent." *Union Savings Bank & Trust Co.* v. *West. Un. Tel. Co.*, 86 N. E. 478 (Oh. Sup. Ct.). The same attempt has been made before.[18] But the law is tending toward further limitation rather than ex-

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[7] See Jochumsen *v.* Suffolk Savings Bank, 85 Mass. 87.

[8] Roderigas *v.* East River Savings Institution, 63 N. Y. 460, 467. This case is referred to as overruled in Matter of Killan, 172 N. Y. 554, 557.

[9] Jochumsen *v.* Suffolk Savings Bank, *supra*. This case is distinguished on the basis of statutes in Roderigas *v.* East Savings Institution, *supra*, 475.

[10] Lavin *v.* Emigrant Industrial Savings Bank, 18 Blatchf. (U. S.) 1, 15; Scott *v.* McNeal, 154 U. S. 34.

[11] See Allen *v.* Dundas, 3 T. R. 125.

[12] Olmstead's Appeal from Probate, 43 Conn. 110, 118.

[13] Coltart *v.* Allen, 40 Ala. 155. *Contra*, Sumner *v.* Parker, 7 Mass. 78; Holyoke *v.* Haskins, 9 Pick. (Mass.) 259. These Mass. cases are now rendered obsolete by statute. Cummings *v.* Hodgdon, 147 Mass. 21.

[14] Moore *v.* Philbrick, 32 Me. 102.

[15] Estate of Shoenberger, 139 Pa. St. 132 (record silent); O'Connor *v.* Higgins, 113 N. Y. 511 (statement of assets in record); Crosby *v.* Leavitt, 4 Allen (Mass.) 410 (lack of assets disclosed by record).

[16] Coltart *v.* Allen, *supra*.

[17] Record *v.* Howard, 58 Me. 225; Hoes *v.* N. Y. N. H. & H. R. R. Co., 73 N. Y. App. 363, 371 (assets within the state expressly averred on the record).

[18] See Jordan *v.* Chicago & N. W. Ry. Co., 125 Wis. 581.

tension of the class of jurisdictional facts.[19] It has been expressly held that it is for the court to decide to whom administration shall be entrusted; and that its action in the matter, however irregular, cannot be impeached collaterally.[20]

EXTINGUISHMENT OF POWERS. — The subject of extinguishment of powers has suffered from a tendency to lay down as established this broad general proposition: that while powers appendant and powers in gross or collateral may be extinguished, a power *simply* collateral may not.[1] This classification, which represents the generally accepted idea of the present English law, is commonly supported on the theory that in the first two cases, since the donee has himself an interest, he may extinguish this interest; in the third case, since he has been given no personal interest in the exercise of the power, he may not extinguish it to the detriment of others.

It is interesting to see where this criterion of personal interest in the donee logically leads in the cases of powers in gross. Where the power is general, the donee has plainly an interest in its exercise, for he may appoint to himself. But when the power is special, the donee may clearly not appoint otherwise than among the specified class, and his own personal interest could not be furthered by the exercise of the power. Furthermore, if he attempts to further his own interests by agreeing to exercise the power in a certain way, such agreement, unless the benefit to himself be merely incidental or unsubstantial, is void.[2] It would therefore seem that if the criterion of interest is to be followed, the donee should not be allowed to extinguish a special power in gross. This test of personal interest in the donee supports the third proposition, that a power *simply* collateral may not be extinguished. All the cases, however, appear to be either of special powers of appointment or of powers of management: the crucial case of a general power of appointment vested in a person who is a stranger to the title has not arisen.

This logical application of the test rests on considerable support in the earlier law.[3] It was applied by Preston, who classified special powers as powers of selection rather than as powers of appointment.[4] Sugden, however, took the contrary view. He felt that if such special powers could not be extinguished by a fine the intention of many settlements to allow a provision to be made for all children whether living at the donee's death or not would be defeated.[5] But it is difficult to see why any such intention could not have been adequately expressed in the settlement, and the abolition of fines and recoveries has swept away the very foundation of the argument.

The five English cases allowing the extinguishment of a special power in gross rested largely on the further reasoning that, though the donee could

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[19] See Salter *v.* Hilgen, 40 Wis. 363; Coltart *v.* Allen, *supra;* Nichols *v.* Smith, 28 N. H. 296.

[20] Simmons *v.* Saul, 138 U. S. 439, 452.

[1] Leake, Digest Law of Property, 386, 387.

[2] Topham *v.* Duke of Portland, 11 H. L. Cas. 32. But *cf. In re* Radcliffe, [1892] 1 Ch. 227; Gilbert *v.* Stanton, 2 Commonwealth L. R. 447.

[3] See Sugden, Powers, 8 ed., 906, 907.

[4] 2 Preston, Abstracts of Conveyancing, 261; 3 *ibid.* 399. See Norris *v.* Thomson's Excrs., 20 N. J Eq. 489.

[5] Sugden, Powers, 8 ed., 907.